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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. PHILLIP B. THOMAS, Defendant and Appellant.	B237004 (Los Angeles County Super. Ct. No. KA093553)

APPEAL from a judgment of the Superior Court of Los Angeles County. Geanene Yriarte, Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Phillip B. Thomas appeals from the judgment entered following a court trial that resulted in his conviction of petty theft with a prior, second degree burglary and grand theft.[1] He contends (1) it was an abuse of discretion to deny probation and (2) use of the same prior conviction to impose the upper term and as an enhancement was error. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the usual rules on appeal (*People v. Zamudio* (2008) 43 Cal.4th 327, 357), the evidence established that between 3:00 and 4:00 p.m. on March 4, 2011, defendant walked in the back door of the Glendora car dealership owned by the Haering family.[2] After talking to Kelly about purchasing a Cadillac Escalade, defendant asked directions to the men's room. Kelly noticed defendant leave the men's room and exit the dealership through the main door. Sensing that something was not right, Kelly went to her office next to the men's room and checked her purse, which was on her desk. Upon discovering that her wallet was missing, Kelly instructed a secretary to call the police. When Kelly told her husband, Larry, that defendant had taken her wallet, Larry went in pursuit. After Larry telephoned a few minutes later, Kelly drove to

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[1] Defendant was charged by information with petty theft with a prior, second degree burglary and grand theft. One prior conviction was alleged pursuant to the Three Strikes law (§§ 1170.12, subds. (a)-(d); 667subds. (b)-(i)), and four prior convictions for which defendant served a prison term were alleged pursuant to section 667.5, subdivision (b). (All undesignated section references are to the Penal Code.) In a bench trial, the trial court found defendant guilty of the substantive charges and found true the allegation that he suffered prior convictions for which he served a prison term in case No. 1021738, case No. 6762025 and case No. FWV700871 (§ 667.5, subd. (b)). In the interests of justice, the trial court struck the prior in case Nos. 1021738 and 6762025. Finding defendant ineligible for probation, it sentenced him to a total of four years in county jail (§ 1170, subd. (h)) on count 1, comprised of the three-year high term for second degree burglary, plus a consecutive one year for the prior conviction in case No. FWV700871. Sentence on counts two and three was imposed but stayed pursuant to section 654. Defendant timely appealed.

[2] To avoid confusion, we refer to witnesses Kelly and Larry Haering by their first names.

where Larry was holding defendant. Larry handed Kelly her wallet. She said the money which had been in the wallet was missing. Defendant took a bundle of cash and papers out of his pocket and handed it to Kelly, who put the bundle on top of her car. Mixed up in the bundle was a store credit for over $1,000 which had been in Kelly's wallet. When the police arrived they found Kelly's keys in defendant's pants pocket. Larry's account of the incident was similar to Kelly's in all material respects. Defendant was cooperative when Larry confronted him and immediately handed over the wallet to Larry.

Matthew Fenner was the Glendora police officer who responded to the call. When he arrived, Kelly said defendant stole her wallet and defendant responded, "Yes, I did. I know I did wrong." Fenner recovered $52 from defendant's left front pocket. He also observed some other money and papers on the top of Kelly's car, which Kelly identified as items defendant had already returned to her.[3] While in the back seat of a patrol car, defendant admitted taking the wallet. A subsequent interview at the police station was video recorded. In it, defendant said he was on his way to the men's room when he noticed the wallet and decided to take it. A portion of the video recording was played for the jury.

Defendant testified that he was taking the bus to Pasadena and got off in Glendora to find a restroom. At the car dealership, he discussed purchasing a Cadillac Escalade with Kelly. While she was on the computer looking up the price, defendant asked for directions to the men's room. On his way there, defendant picked up a wallet he saw laying on a desk next to a purse. In the men's room, defendant opened the wallet. When he saw that it contained only about $5 in paper money and another $20 in change, defendant decided to put it back on the desk. But his plan was thwarted by Kelly, who was standing by the water faucet when he came out of the men's room. Later Larry approached defendant who was waiting at a nearby bus stop; Larry asked defendant about the missing wallet which defendant said he had found. Defendant returned the wallet to

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[3] Although defendant told Fenner that the $52 in his pocket was his own money, Fenner gave that money to Kelly. Kelly kept both that $52 and the $61 defendant had previously handed directly to Kelly.

Larry. When Kelly arrived a few minutes later and said there was money missing from the wallet, defendant took his own money out of his pocket and gave it to Kelly; that money, he testified, was not from the wallet.

DISCUSSION

A. It Was Not An Abuse of Discretion to Deny Probation

Defendant contends the trial court abused its discretion by denying defendant probation. He argues that the decision was irrational and arbitrary because it was contrary to the recommendation of the probation department, and the mitigating factors found by the trial court balanced the aggravating factors. We find no error.

"Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons: [¶] (4) Any person who has previously been convicted twice in this state of a felony . . . ." (§ 1203, subd. (e)(4).) In *People v. Bradley* (2012) 208 Cal.App.4th 64, 89, we recently held that whether a case is an "unusual case" within the meaning of section 1203, subdivision (e)(4) is within the broad discretion of the trial court. " 'An order denying probation will not be reversed in the absence of a clear abuse of discretion. [Citation.] In reviewing the matter on appeal, a trial court is presumed to have acted to achieve legitimate sentencing objectives in the absence of a clear showing the sentencing decision was irrational or arbitrary. [Citations.]' [Citation.]" (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1091.) The function of the probation report is to assist the trial court in exercising its discretion but it is the trial court, not the probation officer, who makes the final determination. It is not an abuse of discretion for the trial court to depart from the probation officer's recommendation. (*People v. Sanchez* (1982) 131 Cal.App.3d 718, 739-740.)

California Rules of Court, rule 4.413(c) sets forth the facts which may indicate an "unusual case" in which probation may be granted.[4] These include whether "the fact or

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[4] All future undesignated rule references are to the California Rules of Court.

circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence" (Rule 4.413(c)(1)(A).) There is no requirement that the trial court formally balance aggravating and mitigating factors in deciding whether to grant probation. (*People v. Morado* (1990) 221 Cal.App.3d 890, 894.)

Here, the trial court found true three prior felony convictions that made defendant ineligible for probation absent a finding that this was an unusual case in which the interests of justice would best be served by granting probation. Although the probation department believed this was an "unusual case" warranting probation, the trial court disagreed. It found "defendant is ineligible for probation pursuant to [] section 1203, subdivision (e)(4). The court does not find this is an unusual case where the interest of justice would best be served if defendant was granted probation. The defendant has numerous felony convictions and a continuous criminal history and the court does not believe that this is a defendant [who] would be successful on probation." The trial court's finding was supported by the record, including the fact that defendant was on active parole when he committed the burglary. In addition to specified convictions beginning in 1972, the probation report stated that defendant had 11 prior convictions that were not included in the probation report. The report stated: "Per NCIC the defendant's CII record is too large for transmission." Under these circumstances, defendant has not shown the trial court abused its discretion in finding that this case was not an "unusual case" within the meaning of section 1203, subdivision (e)(4).

B. The Trial Court Did Not Improperly Use the Same Factor to Impose the Upper Term and as a Sentence Enhancement

Defendant contends the trial court improperly used as a reason for imposing the upper term that defendant had served a prior prison term because the trial court also had used that fact as a sentence enhancement. He is incorrect.

At the time of defendant's sentencing hearing on October 13, 2011, section 1170, subdivision (b) read: "(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports, including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation . . . and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and *the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. . . .*"[5] (Italics added.)

Under section 1170, subdivision (b), because a prior prison term enhancement is based on the fact of a prior conviction, the same prior conviction generally cannot support imposition of an aggravated term and a section 667.5, subdivision (b) sentence enhancement. (*People v. McFearson* (2008) 168 Cal.App.4th 388, 392 (*McFearson*); see also 3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Punishment, § 404.) However, "a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so." (Rule 4.420(c).) Moreover, as long as the trial court relied on one proper aggravating circumstance to impose the upper term, it is irrelevant that the trial court may have also relied on other improper circumstances. (See e.g., *People v. Myles* (2012) 53 Cal.4th 1181, 1220-1221 ["[I]mposition of the upper term does not violate a defendant's jury trial right 'so long as one legally sufficient aggravating circumstances has been found to exist by the jury,' or 'has been admitted by the defendant.' "].)

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[5] Section 1170 was amended, operative June 27, 2012. (Stats. 2012, ch. 43, § 27.) The amendment is not relevant to the issue on appeal.

Here, the trial court explained its selection of the three year high term as follows: "The court has considered the following circumstances in aggravation under [rule 4.421(b):] the defendant's prior convictions as an adult are numerous or increasing in seriousness [(rule 4.421(b)(2))]; the defendant has served a prior prison term, multiple terms actually in this case [(rule 4.421(b)(3))]; the defendant was on probation or parole when the crime was committed, and that was for a []section 666 [(rule 4.421(b)(4))]; and the defendant's prior performance on probation or parole was unsatisfactory [(rule 4.421(b)(5))]." Under rule 4.420, because the trial court struck two of the three section 667.5, subdivision (b) prior convictions it found true, it was not precluded from using those stricken prior convictions as aggravating factors. Moreover, the trial court cited numerous aggravating factors other than defendant's prior convictions, including the reason that defendant was on probation or parole when the charged crimes were committed and his prior performance on probation or parole was unsatisfactory. Under these circumstances, the trial court did not engage in an improper dual use to both aggravate and enhance the sentence.

DISPOSITION

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.